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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 JACOB S. SILVERMAN,
11 Plaintiff,
12 v.
13 OFFICER LANE, et al.,
14 Defendants.
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16 Case No. 18-04510 BLF (PR)

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**ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against officers at the Humboldt County Correctional Facility. Plaintiff's motion for leave to proceed *in forma pauperis* will be addressed in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim

1 upon which relief may be granted or seek monetary relief from a defendant who is immune
2 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
3 construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
5 elements: (1) that a right secured by the Constitution or laws of the United States was
6 violated, and (2) that the alleged violation was committed by a person acting under the
7 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff’s Claims**

9 Plaintiff claims that on June 24, 2018, Defendant Deputy Twitchell grabbed his
10 “forearm/hand” through the tray slot and tazed him with a “tazer harnessed in hand.”
11 (Compl. at 3.) Plaintiff claims that he was tazed again on July 1, 2018, this time by
12 Defendant Corporal Lane while Defendant Deputy Ayala was standing by. (*Id.*) Plaintiff
13 claims that Deputy Ayala owed him a duty of protection from excessive force but merely
14 “smiled afterwards and to others.” (*Id.*) Plaintiff claims that “[b]oth relished in this tazing
15 with malicious sadistic evil illegal spirits.” (*Id.*) Liberally construed, these allegations are
16 sufficient to state cognizable claims for excessive force and failure to protect prisoner’s
17 safety. *See Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Farmer v. Brennan*, 511 U.S.
18 825, 832-34, 837 (1994).

19
20 **CONCLUSION**

21 For the reasons state above, the Court orders as follows:

22 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
23 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
24 of the complaint, all attachments thereto, and a copy of this order upon **Defendants**
25 **Corporal Lane, Deputy Ayala, and Deputy Twitchell at the Humboldt County**
26 **Correctional Facility** (826 4th Street, Eureka, CA 95501). The Clerk shall also mail a
27 copy of this Order to Plaintiff.

1 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil
2 Procedure requires them to cooperate in saving unnecessary costs of service of the
3 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this
4 action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail
5 to do so, they will be required to bear the cost of such service unless good cause shown for
6 their failure to sign and return the waiver form. If service is waived, this action will
7 proceed as if Defendants had been served on the date that the waiver is filed, except that
8 pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer
9 before **sixty (60) days** from the day on which the request for waiver was sent. (This
10 allows a longer time to respond than would be required if formal service of summons is
11 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver
12 form that more completely describes the duties of the parties with regard to waiver of
13 service of the summons. If service is waived after the date provided in the Notice but
14 before Defendants have been personally served, the Answer shall be due sixty (60) days
15 from the date on which the request for waiver was sent or twenty (20) days from the date
16 the waiver form is filed, whichever is later.

17 3. No later than **ninety-one (91) days** from the date this order is filed,
18 Defendants shall file a motion for summary judgment or other dispositive motion with
19 respect to the claims in the complaint found to be cognizable above.

20 a. Any motion for summary judgment shall be supported by adequate
21 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
22 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
23 qualified immunity found, if material facts are in dispute. If any Defendant is of the
24 opinion that this case cannot be resolved by summary judgment, he shall so inform the
25 Court prior to the date the summary judgment motion is due.

26 b. **In the event Defendants file a motion for summary judgment, the**
27 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**

warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See *Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **twenty-eight (28) days** from the date Defendants' motion is filed.

Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff without a trial. See *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

5. Defendants *shall* file a reply brief no later than **fourteen (14) days** after Plaintiff's opposition is filed.

6. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

7. All communications by the Plaintiff with the Court must be served on Defendants, or Defendants' counsel once counsel has been designated, by mailing a true copy of the document to Defendants or Defendants' counsel.

8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

1 10. Extensions of time must be filed no later than the deadline sought to be
2 extended and must be accompanied by a showing of good cause.

3 **IT IS SO ORDERED.**

4 Dated: December 10, 2018

Beth Labson Freeman

5 BETH LABSON FREEMAN
6 United States District Judge